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Nos. 14-1418, 14-1453, 14-1505,
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IN THE
Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, *et al.*, *Petitioners*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*, *Petitioners*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

SOUTHERN NAZARENE UNIVERSITY, *et al.*, *Petitioners*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

GENEVA COLLEGE, *Petitioner*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

DAVID A. ZUBIK, *et al.* *Petitioners*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

PRIESTS FOR LIFE, *et al.*, *Petitioners*
v.
DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*, *Respondents*

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, *et al.*, *Petitioners*
v.
SYLVIA BURWELL, *et al.*, *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF AMICUS CURIAE THE SCHOOL OF THE OZARKS, INC. D/B/A COLLEGE OF THE OZARKS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The School of the Ozarks, Inc. d/b/a College of the Ozarks (the "College") is a four-year, co-educational college located in Point Lookout, Missouri. The College is unique because of its five-fold emphasis – academic, vocational, Christian, patriotic, and cultural – that is designed to develop citizens of Christ-like character who are well-educated, hard-working and patriotic. All full-time students are required to work in the campus work program to help offset the cost of their education.

The College has long been guided by its Christian worldview that teaches that human sexuality is a gift from God and that the purpose of this gift includes the procreation of human life and the uniting and strengthening of the marital bond in self-giving love. Thus, the College believes that human life begins at conception, i.e., at the fusion of two haploid gametes resulting in the formation of a zygote (the "Child"). The College believes that the abortion of a Child is a grievous moral wrong. The government has never questioned the sincerity of the College's religious belief on this issue.

The College provides health insurance to its 272 employees and their families. The Affordable Care Act of 2010 (ACA) requires that insurance to cover contraceptive services, including abortifacients such as ulipristal acetate, also known as *ella* or the "week-after pill" ("*ella*"), and the "morning after pill" ("Plan

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[1] No counsel for a party authored this brief in whole or in part and no person or entity other than amicus curiae made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties are on file with the Clerk.

B"). The provision of those abortifacients violates the College's sincere religious beliefs.

Regulations issued by the Department of Health and Human Services (HHS) purport to allow the College to avoid the provision of abortifacients by notifying either the insurance carrier or HHS of its religious objection to such services. For two separate reasons, that purported escape hatch is illusory. First, the economic reality is that the College is in fact paying for abortifacients. Second, the very act of notifying the insurance carrier or HHS causes the carrier to provide abortifacients to the College's employees through the College's health insurance plan. That makes the College complicit in what it views as a deeply sinful act.

The College has a particularized interest in these proceedings because its own case involving the issues raised here is pending before the United States Court of Appeals for the Eighth Circuit. *School of the Ozarks, Inc. v. HHS, et al.*, 86 F. Supp.3d 1066 (W.D.Mo. 2015), *appeal docketed*, No. 15-1330 (8th Cir. Feb. 13, 2015). The disposition of these cases will thus control the College's appeal.

ARGUMENT

I. THE CONTRACEPTIVE MANDATE EFFECTIVELY REQUIRES THE COLLEGE TO PAY FOR ITS EMPLOYEES' ABORTIFACIENTS.

It is indisputable that requiring the College to pay directly for its employees' abortifacients would substantially burden the College's sincere religious beliefs, and thus violate the Religious Freedom Restoration Act (RFRA). *Burwell v. Hobby Lobby*

Stores, Inc., 134 S.Ct. 2751, 2782 (2014). The HHS regulations attempt to avoid that burden by providing for "separate payments" for such services. Given the fungibility of money, the economic reality is that the College is effectively paying for abortifacients.

45 C.F.R. § 147.131(c)(1) purports to allow religious organizations to avoid the contraceptive requirement by sending an "opt out" letter either to the insurance carrier or to HHS. An insurer receiving such notice must, in theory, amend the insurance policy to exclude coverage for contraceptive services. But the insurer still must provide those services, the only qualification being that it must provide "separate payments for any contraceptive services required to be covered for plan participants and beneficiaries for so long as they remain enrolled in the plan." 45 C.F.R. § 147.131(c)(2)(B).

As the fate of the federally subsidized insurance cooperatives proves, insurance companies that do not take in sufficient revenue to cover their costs go out of business. The premiums that the insurance company charges the College must be high enough to cover the cost of contraceptive services whether that portion of the premium is kept in a separate account or not. The fig leaf HHS has devised is not nearly large enough to cover the economic reality.

In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this Court denied a first amendment challenge to 18 U.S.C. § 2339B, which prohibits providing material support to an organization designated as terrorist. Plaintiffs acknowledged that combatting terrorism was a compelling national interest. But they argued that the services they wished to supply were for peaceful purposes, and hence the statute was not narrowly tailored to that interest.

The Court disagreed, in no small part because "[m]oney is fungible." 561 U.S. at 37 Support for allegedly peaceful functions "frees up other resources within the organization that may be put to violent ends." *Id.* at 30. Money that "a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activity." *Id.* at 37. *Accord, Ransom v. FIA Card Services, N.A.*, 562 U.S. 61, 79 (2011) ("[t]he $14,000 that Ransom spent to purchase his Camry outright was money he did not devote to paying down his credit card debt").

These cases are in point. The economic reality here is that the insurance company is using the premiums paid by the College to fund abortifacient services that are anathema to the College's sincere religious beliefs. The notion that the payments the insurance company makes come from some other pot of money is simply fantasy.

Even if the Court accepts that fantasy as real, the College is still paying for abortifacients. Suppose that the insurance company segregates the College's premium into a separate account that does not fund abortifacients for the College's employees. It would pay for those services out of monies derived from other clients. And the insurance company would use the funds in the segregated account to pay for abortifacients for employees of other clients, whether or not they objected. Paying for abortifacients for other companies' employees is no less a violation of the College's sincere religious beliefs than paying for its own employees' coverage.

Retail Clerks Int'l Ass'n. Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746 (1963), unanimously rejects that kind of legerdemain. Section 14(b) of the

Taft-Hartley Act (1947) specifically provided that collective bargaining agreements could not condition employment on union membership if a state chose to forbid that practice. Florida chose to do so.

The collective bargaining agreement between the Retail Clerks and the plaintiffs' employer nonetheless required payment of an initiation fee and a service fee equal to the dues required of union members. The Retail Clerks argued that it allocated 100% of the non-union members' payments to collective bargaining expenses.

This Court dismissed that argument as of "bookkeeping significance only rather than a matter of real substance." 373 U.S. at 753. If that fiction were true, it would mean that the non-member was paying more than his or her pro rata share of the collective bargaining expense, thus "subsidiz[ing] the union's institutional activities." *Id.* at 754. The same is true here. Forcing the College to subsidize abortifacients for other companies' employees is at least as intrusive on its religious views as forcing it to subsidize its own employees.

In the past, the government has attempted to justify the contraceptive mandate on the ground that preventing unwanted pregnancies saves more money than the contraceptives cost. As an empirical matter, there is "little evidence" to support this proposition. "*Analyzing the Impact of State Level Contraception Mandates on Public Health Outcomes*," 13 Ave Maria L. Rev., 345, 368 (2015). Even if the policy does save money, the fact remains that the insurance carrier is using the College's premium to pay for activities that the College finds to be deeply immoral.

When examined in the light of economic reality, therefore, the opt-out provision that HHS has mandated is a clear and substantial burden on the College's sincere religious views.

II. THE HHS REGULATIONS IMPOSE A SUBSTANTIAL BURDEN ON THE COLLEGE'S RELIGIOUS BELIEFS.

The HHS regulations purport to allow the College an escape hatch from the ACA's contraceptive mandate. But the escape hatch is entirely illusory. The very act of notifying HHS or the insurance carrier of its religious objection to the provision of abortifacients directly causes the insurance carrier to provide such benefits ***through the College's plan***. Thus, the notice directly involves the College in a practice that violates its sincere religious beliefs.

Hobby Lobby made clear that RFRA provides broad protection for "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 134 S.Ct. at 2762 (emphasis added). Protected exercise encompasses "not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons." *Id.* at 2770 (internal punctuation omitted).

For purposes of RFRA, a "substantial burden" is one that puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 718 (1981). The draconian penalties imposed by the ACA on non-compliant employers easily satisfy that test. The $100 a day fine per employee would cost the College almost $10,000,000 per year.

In *Hobby Lobby*, the Court had "little trouble" in concluding that the ACA substantially burdened the exercise of religion because "if the [plaintiffs] do not yield to this demand [that they provide objectionable contraceptive coverage] the economic consequences will be severe." 134 S.Ct. at 2775. The Court concluded that "the mandate clearly imposes a substantial burden" on Hobby Lobby's religious beliefs, because it would face "substantial" fines if it insisted on providing coverage in accordance with its religious beliefs. *Id.* at 2775-76, 2779.[2] *Accord*, *Dordt College v. Burwell*, 801 F.3d 946, 950 (8th Cir. 2015) ("by coercing Dordt and Cornerstone to participate in the contraceptive mandate and accommodation process under threat of severe monetary penalty, the government has substantially burdened Dordt and Cornerstone's exercise of religion").

The lower courts that have rejected RFRA challenges mistakenly focus on the relatively minimal administrative burden of providing the required notice. That focus misses the point. The very act of providing that notice leads directly to the provision of abortifacients through the College's plan and hence to an action that the College sincerely believes to constitute a mortal sin. The one Circuit that has properly analyzed *Hobby Lobby* correctly understood that, "if one sincerely believes that completing Form 700 or HHS Notice will result in conscience-violating consequences, what some might consider an otherwise neutral act is a burden too heavy to bear." *Sharpe*

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[2] *Hobby Lobby* also noted that plaintiffs would face substantial fines if they failed to provide insurance coverage to avoid the contraceptive mandate. 134 S.Ct. at 2776. At $2,000 per employee over 30, that would cost the College almost $500,000 per year.

Holdings, Inc. v. HHS, 801 F.3d 927, 941 (8th Cir. 2015).

The lower courts have also gone astray in finding that the connection between the notice and the sin is too attenuated to constitute a substantial burden. The regulations make clear that the insurer provides coverage of abortifacients to the beneficiaries solely by virtue of the religious nonprofit's plan and only "so long as they remain enrolled in the plan." 29 C.F.R. § 2590.715-2713A(c)(2)(i)(B); 45 C.F.R. § 147.131(c)(2)(i)(B). Thus, the religious nonprofit's insurer is obliged to cover abortifacients only because the religious nonprofit maintains a contractual relationship with its insurer. But for the religious nonprofit's contract with its insurance provider and submission of the self-certification, the religious nonprofit's insurance carrier would not be providing this coverage to the religious nonprofit's employees and their dependents.

Thus, any argument that the connection is too attenuated impermissibly substitutes the judgment of the courts about what is sinful for that of the College. As *Hobby Lobby* holds, RFRA allows private religious believers to decide for themselves whether a particular action "is connected" to objectionable conduct "in a way that is sufficient to make it immoral." 134 S.Ct. at 2778:

> This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business

> addressing (whether the religious belief asserted in a RFRA case is reasonable).
>
> [The plaintiffs] sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function in this context is to determine" whether the line drawn reflects "an honest conviction," and there is no dispute that it does.

Id. at 2778-79

Once the Court acknowledges that the HHS regulations do impose a substantial burden on the College's exercise of its sincere religious beliefs, the case is over. RFRA requires strict scrutiny – *i.e,* the government must establish a compelling national interest that cannot be satisfied in any less intrusive fashion. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 424, 430 (2006).

The government cannot satisfy either part of that test. The ACA allows numerous exceptions from its contraceptive mandate – *e.g.*, grandfathered plans or strictly religious organizations. A law cannot protect a compelling interest "when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547 (1993).

Nor is the HHS regulation the least restrictive means to serve that interest. As *Hobby Lobby* recognized, the "most straightforward way" for the government to provide contraceptives is to pay for them itself if an employer does not due to sincere religious beliefs. 134 S.Ct. at 2780. "This would certainly be

less restrictive of the plaintiffs' religious liberty, and HHS has not shown that this is not a viable alternative." *Id.*

CONCLUSION

This Court should reverse the judgments of the Courts of Appeals.

Respectfully submitted,

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